



#### AT A GLANCE

There's always a risk that an unhappy customer may try to take you to court.

Be sure that the seller fully discloses any problems with the property.

Go through each sales contract carefully to be sure it's complete and accurate.

Communicate frequently with your customers, especially when you have bad news.

## LEGAL SLIP-UPS

# ok Out!

## You Could Lose Your License

It pays to be diligent in your real estate transactions. Here are common legal slip-ups and ways to avoid them.

BY RICHARD WESTLUND

**A** sales associate who didn't communicate the risks of the short sale process had to answer a buyer's complaint to the Florida Real Estate Commission (FREC). A broker and a sales associate lost their licenses after a landlord failed to receive timely payments on a rental property. And one incorrect phrase in a sales contract led to an expensive lawsuit for another broker.

If you're like most Florida real estate professionals, you don't spend much time worrying about losing your license.

You communicate frequently with your customers, stay on top of deposits and escrow payments and follow the National Association of Realtors® Code of Ethics and Standards of Practice. But no matter how good you are, there's still a risk that an unhappy customer may file a complaint with FREC or try to take you to court.

Juana Watkins, director of the Florida Division of Real Estate in Orlando, says the most common violations against a real estate licensee involve commission

fraud, misrepresentation, concealment, culpable negligence and dishonest dealing during a transaction. "Our division has observed a recent increase in cases involving escrow-related violations, specifically failure to reconcile escrow accounts and failure to account and deliver funds," she says.

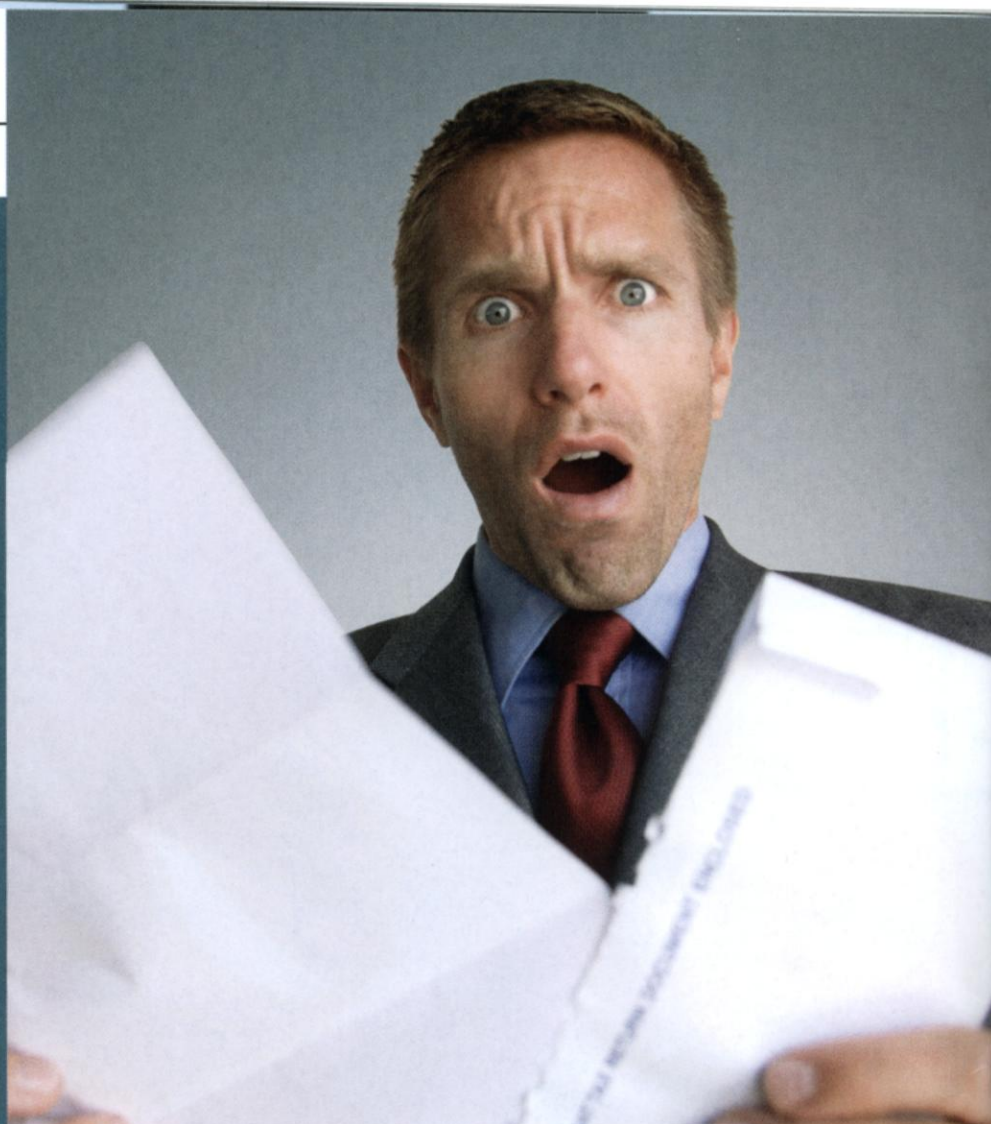
Sarasota attorney Sylvia Golden Norris, who represents real estate associations, agrees that escrow and disclosure issues are the biggest sources of complaints and lawsuits today.

**NOW  
YOU  
KNOW**

Sales associates who attempt to find creative ways to supplement their income by performing services outside the direction, control or management of their brokers, could face charges of violating Florida law if those services fall within the definition of broker services (per Section 475.01, Florida Statutes).



Don't ignore a letter of complaint. After all, the possible penalties include suspension of your license and a \$5,000 fine.



## Tips for Avoiding Problems

- Document your conversations.
- Over communicate with customers.
- Fill out contracts completely and correctly.
- Make sure buyers have reasonable expectations about the home.
- Suggest the customer engage an attorney in short sale and foreclosure transactions.
- Verify deposits and other escrow funds.
- Disclose any potential problems as soon as possible.
- Keep a separate ledger for each property management customer.

"Escrow funds are big-ticket items, and you have to follow the appropriate procedures to confirm who's holding those funds and protect yourself."

Of course, "It's always best to avoid licensing and legal problems," says attorney **Joe Boyd**, a partner with **Boyd, DuRant & Sliger, PL**, in Tallahassee. "Regardless of whether you're right or wrong, responding to complaints is expensive and time consuming. You simply can't afford to damage your reputation over any deal."

Here are some tips for avoiding common legal issues:

### Disclose, Disclose, Disclose

**Steven J. David**, president of **Florida Professional Real Estate** in Fort Lauderdale, says another leading source of complaints is inadequate disclosure about property conditions, especially with short sales, foreclosures and loan defaults. "When people have money problems, they stop taking care of their homes," he says. "Buyers think they're getting a great deal when they close on the property, but then

they find out something is wrong. At that point, they may go back to the sales associate and say, 'Why didn't you tell me?'"

Adequate disclosure can be a tricky issue, especially when a property is in less-than-perfect condition. Under Florida's regulations, a real estate professional working with a buyer should see that anything is disclosed that materially affects the value of the property and that is not readily apparent. In that regard, associates and brokers should err on the side of caution, according to David. "A water stain on the wall might be visible to the buyer, but you should still point it out," he adds. "If there's a problem after the sale, you don't want the buyer to say he or she couldn't see the water marks."

Norris says it's important to be sure that the sellers—not the sales associate—complete the disclosure form. "The only thing a real estate licensee should complete is the name of the seller and the property address," she says. "Do not check the boxes yourself. That's very important, because if there's a problem



## FREC COMPLAINTS

# How to Handle a Complaint Against You

Here's what to do if you receive a FREC complaint against you.

If you receive a letter from the Florida Real Estate Commission (FREC) telling you that someone has filed a complaint about your service, you need to respond quickly and take steps to protect your license. After all, the possible penalties include suspension of your license and a \$5,000 fine.

"Don't ignore a letter of complaint," says **Daniel Villazon**, a former FREC counsel who has his own law firm in Celebration. "You should consult an attorney who understands these issues and file a response within 20 days." Prompt action is vital because you may be able to resolve the complaint with FREC before the matter becomes public.

In general, if FREC receives a complaint, it will send out an investigator to contact you for an interview. Once the investigation is complete,

the investigator will write a report. You have the right to see that report, and if you don't think the facts are accurate, you can write a response. Then, a FREC attorney will review the report, along with your response, and make a recommendation to take formal action, dismiss the case or provide a "letter of guidance," which is similar to a dismissal.

If the complaint is dismissed or results in a letter of guidance, the matter remains confidential. However, if FREC decides to take formal action, 10 days later the complaint becomes public record and is available online. You can then request a full hearing with an administrative law judge. You can also request an information hearing or enter into a stipulated agreement, which is similar to a no-contest plea. Those outcomes are also made public.

**"You should consult an attorney who understands these issues and file a response within 20 days."**

— Daniel Villazon, Daniel Villazon, PA  
Celebration

later on, the seller might say, 'I didn't do that' or 'The agent told me what to say.'"

If there's more than one name on the deed, the co-owners should sign the disclosure, Norris adds. If there are blanks, the associate should ask the sellers to fill them in or add an "NA" for "not applicable."

In representing banks and other lenders selling real estate owned (REO) properties, David uses an extensive disclosure form that may run 19 or 20 pages of a 25-page contract. "But I'm still concerned that buyers' agents aren't providing enough advice to their clients," he adds. "We suggest that these agents advise their buyers to hire an attorney when doing a REO or short sale, as real estate

professionals are not trained or licensed to provide legal advice."

However, a sales associate should understand that a seller's disclosure checklist is "just the starting point," according to Boyd. For example, if sellers know that there's low water pressure above the 30th floor of a condo building, they need to disclose that fact, regardless of whether it's on the form.

An associate should also disclose to a new buyer the findings of previous inspections, David adds. "Many people today are trying to buy distressed properties in any condition," he says, "so why not be safe and overdisclose?"

Because many foreclosed properties

have code enforcement violations, liens or other problems, sales professionals should inform their customers about title insurance issues. "A standard contract refers to insurable and marketable title," says David. "Marketable means you have the right to sell the property later on. Insurable means there is a problem, but the title company is willing to insure it anyway. That could result in a potential problem down the road when the buyer tries to sell the property."

Other problematic areas include restrictive covenants on the property, maintenance costs for private roads or provisions that allow a cellular tower



**GREAT IDEA GET IT IN WRITING.** Sarasota attorney Sylvia Golden Norris advises documenting important conversations with customers. "If something isn't in writing, it doesn't exist," she adds. "You don't want a judge or a jury deciding which side is telling the truth." Norris says the best documentation is something signed by the customer; however, you can also document your actions through emails or written materials. For example, you may advise a seller to hire an attorney to advise on the legal aspects of a short sale transaction, or you may recommend that a buyer engage an inspection service prior to closing. "In these cases, you can document the fact that you've advised your clients to take certain actions," she says. "That puts them on notice and can shift the burden to them. Then, you have written documentation if someone later files a complaint."



to be placed on the property. Boyd says that neighborhood rezoning requests or variances for nearby properties can also be an issue, since they can affect a property's future value.

### Contract Pitfalls

Another common source of complaints relates to sales contracts. "In today's market, you have to be accurate and thorough," says Boyd. "The goal is to have a meeting of the minds with proper safeguards and disclosures for both parties."

In writing a contract, Boyd advises avoiding careless phrases or buzzwords that could come back to haunt you. For example, a sales contract for a small shopping center included the standard phrase "with all equipment and fixtures." However, the center's tenants, not the seller, actually owned the equipment. The buyer had thought he was buying a store, rather than a shell building, and as a result, he filed a lawsuit against the broker.

If there's one behavior that gets real estate professionals into trouble with their customers, it's failure to communicate. "Buyers and sellers get upset if they don't know what's going on."

— Daniel Villazon

Boyd says it's also important to be careful with the "right of first refusal." Unless that right has a time limit and clear conditions, that simple phrase could put a potential sale on hold indefinitely, frustrating both the seller and other would-be buyers.

David has seen other types of problems with sales contracts, such as using outdated forms, leaving key provisions blank or failing to have the customer sign or initial the appropriate points. "I teach contract classes, and from the questions I receive, I know that many sales associates haven't received enough training," he says. "It's the brokers' responsibility to teach their agents how to prepare contracts correctly."

In fact, Watkins recommends that brokers interact regularly with their sales associates—especially since Florida Statutes allow a broker to be disciplined for failing to direct, control or manage a sales associate. "In many complaints received by the Division of Real Estate against sales associates, brokers weren't

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involved in the transaction,” Watkins says. “In some instances, these brokers are still charged for the actions of the sales associate. Management of agents is not only legally required; it’s also a great way to protect against some complaints.”

### Manage Properties Effectively

Property management is a growing concern for state investigators, according to attorney **Daniel Villazon**, of **Daniel Villazon, PA**, in Celebration. “Landlords are complaining that they’re not getting a full accounting of the money, and there seems to be a higher incidence of misappropriation of rental funds,” he says.

Watkins agrees, and points to the case of a real estate broker who employed a sales associate to manage a rental property in Tallahassee. The broker later notified the associate that she was discontinuing property management services and that the sales associate needed to obtain a broker’s license. However, the sales associate continued to manage property without acquiring the appropriate license.

Several months later, the landlord received a rent check that was returned for insufficient funds. It turned out that the tenant had paid more than \$5,000 in rent, but the landlord hadn’t received it, according to Watkins. FREC revoked the licenses of both the broker (who knew that the sales associate was participating in these activities without the proper license) and the associate. The property management company was administratively dissolved prior to imposition of a penalty.

To provide better accountability and prevent those types of problems, Villazon

recommends keeping a separate ledger for each property management customer, showing all incoming and outgoing funds with supporting documents. “Then, when an owner asks about the financials, all you have to do is print out the ledger,” he says. “And if you see there’s a shortage or some other problem, notify the owner and take action to correct it.”

### Communicate

If there’s one behavior that gets real estate professionals into trouble with their customers, it’s failure to communicate. “Buyers and sellers get upset if they don’t know what’s going on,” says Villazon. “Then, if a problem arises, such as a lender turning down a short sale request, they may think the sales associate or broker didn’t represent their best interest.”

David adds that there’s also a need for prompt, effective communication among agents and brokers. “Professional courtesy means returning phone calls, answering questions and keeping a transaction moving,” he says. “Otherwise, there could be liability issues.”

Looking ahead, Boyd says that the volume of complaints against real estate professionals is likely to rise in the next few years. “During the downturn, people were more accepting of problems. Now that we’re getting back to a more normal economy, I would expect the number of complaints to turn upward again. That means real estate professionals need to understand and follow the laws and regulations.” ○

*Richard Westlund is a Miami-based freelance writer.*